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# The Doctrine of Incorporation by Reference: In re Herzog's Estate

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## *INTRODUCTION*

Montana has recently joined the majority of her sister states by indicating that she will follow a well-known, though not often applied, common law principle applicable to testamentary disposition. In the case of *In re Herzog's Estate*,[1] the Montana supreme court recognized and applied the doctrine of incorporation by reference to an ante-nuptial agreement. The effect of the application of the doctrine was to allow the proceeds of a life insurance policy taken out pursuant to the agreement to become an effective bequest under the provisions of the will.

The court appears to have been on good grounds as to its statement of the doctrine of incorporation by reference. The particular circumstances surrounding the doctrine's application, however, and the fact that this represents Montana's first treatment of the doctrine render the decision worthy of discussion.

### THE DECISION

On the day of their marriage, Florence and Rudy Herzog entered into an ante-nuptial agreement[2] which, although written to make the marriage "solid and lasting,"[3] provided that the property and earnings of the parties were to remain in the same ownership status as before the marriage. It provided further that Florence should be made the beneficiary of a $20,000 life insurance policy so long as the parties remained married. Fourteen months later Rudy died and by his will left the bulk of his estate to the five minor children by his previous marriage. The third paragraph of the will provided that nothing, other than that provided in the ante-nuptial agreement, should pass to his estranged wife Florence.

[1]In re Herzog's Estate, ..... Mont. ....., 513 P.2d 9 (1973).

[2]The ante-nutial agreement provided that the wife would be made beneficiary of the policy so long as the parties were married. The property and earnings of each spouse were to remain in the same ownership status as before the marriage; and in the event of divorce, a payment of $400 per month would be paid to the wife for a stated period and would be a full and complete settlement for all claims arising out of the divorce. It concluded with the following statement:

> It is understood that the provisions herein provided for in this sub-paragraph (the divorce settlement) are contemplated to make the marriage a solid and lasting marriage, and that the hopes and aspirations of the parties are to this effect, rather than a divorce, and a dispute over alimony, support, dower rights and other claims that can arise as a result of a divorce between married persons. It is further agreed that nothing herein shall be construed to be a bar by either Party giving to the other Party any property of which he or she may be possessed to the other Party by will or otherwise. It is understood that each Party to this Agreement shall control his or her own personal estate described herein, and do with the properties whatever he or she wishes or wills. *Id.* at 10.

The court did not concern itself with the effect or legality of the ante-nutial agreement since that issue was never raised by either party.

[3]*Id.* at 10.

Apparently assuming that she had been intentionally disinherited, the widow filed no renunciation of the will. Rather, she sought to recover her statutory share by filing a petition to determine heirship eight months after the will had been admitted to probate. The Montana supreme court, affirming the summary judgment of the Gallatin County district court, held that Florence Herzog had not been expressly disinherited. Instead, the court stated:

> . . . by the doctrine of incorporation by reference, the third paragraph of the will operates to include, as an effective bequest within the will, $20,000 to be paid out of the proceeds of a specific life insurance policy. . . . Since the provisions of the ante-nuptial agreement were incorporated by reference into the will and amounted to a bequest under the will, the provisions of section 22-107, R.C.M., 1947 are applicable, i.e. the widow, Florence Herzog, had the statutory right to renounce the will.[4]

Since she had not filed her renunciation within the six month statutory limitation, the widow lost her right to elect to receive her statutory share.[5]

In light of these holdings, the purpose of this note is to explore the doctrine of incorporation by reference, its application in the *Herzog* case, and particularly to determine whether anything passed to Mrs. Herzog under the will.

## *THE DOCTRINE OF INCORPORATION BY REFERENCE*

The doctrine of incorporation by reference allows an instrument, which is not executed in testamentary form[6] nor integrated[7] into the

[4] *Id.* at 11

[5] REVISED CODES OF MONTANA, § 22-107 (1947) [hereinafter cited as R.C.M. 1947]. This section provides:

> Every devise or bequest to her husband's will shall bar a widow's dower in his lands and her share in his personal estate unless otherwise expressed in the will; but she may elect whether she will take under the provisions for her in the will of her deceased husband or will renounce the benefit of such provisions for her, and take her dower in the lands and her share in the personal estate under the succession statutes, as if there had been no will, but not in excess of two-thirds (2/3) of the husband's net estate, real and personal, after the payment of creditor's claims, expenses of administration and any and all taxes, including state and federal inheritance taxes.

R.C.M. 1947, § 22-108. When a woman is entitled to an election under this chapter, she shall be deemed to have taken such devise, unless, within six months after the authentication or probate of the will, she shall deliver or transmit to the district court of the proper county a written renunciation. . . .

[6] R.C.M. 1947, § 91-107. Written will, how to be executed.

> Every will, other than a nun-cupative will, must be in writing and every will, other than a holographic will must be executed and attested as follows:
>
> 1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;
>
> 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;
>
> 3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,
>
> 4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

[7] 2 BOWES-PARKER, PAGE ON WILLS, § 19.9 (1960). Integration allows several pieces of paper, all of which are taken together and executed in testamentary form at the

will of the testator, to be incorporated into the will and to become a part of the will in legal effect.[8] The doctrine originated in the English law of wills[9] and has been adopted by the vast majority of jurisdictions in the United States.[10] Because of the possibilities for fraud, a number of jurisdictions have refused to apply the doctrine.[11] For the same reason, those states which recognize the doctrine have placed strict requirements upon its application. Among these are: 1) the extrinsic document must be in existence at the time the will is written, 2) the will must identify the document by a sufficiently certain description, and extrinsic evidence is admissible as an aid to such identification, and 3) it must appear that the testator intended to incorporate the paper for the purpose of carrying out his testamentary desires.[12]

Incorporation by reference has been applied to many types of documents including other wills,[13] codicils,[14] deeds or conveyances,[15] simple lists,[16] trust instruments,[17] and ante-nuptial agreements.[18] When these various documents are incorporated, it is the instrument itself which becomes a part of the will and directs disposition of property already a part of the testator's estate. Operation of the doctrine does not bring additional property into the estate.[19]

## MONTANA'S TREATMENT

The Montana court's first mention of the doctrine did not occur in *Herzog*. In the case of *In re Watt's Estate*,[20] the plaintiff, testator's sister, petitioned for application of the doctrine in order that an undelivered deed and a bill of sale for decedent's ranch might be incorporated by reference into a letter offered by plaintiff as a valid, holo-

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same time to take effect as the will of the testator. All of the papers must be present at the time of execution. This differs from incorporation by reference in that a document which is incorporated need only be in existence at the time of the execution of the will.

[8]*Id.* at § 19.7.

[9]Molineux v. Molineux, Cro. Jac. 144, 79 Eng. Rep. 126, 127 (1605).

[10]2 BOWES-PARKER, *supra* note 7 at § 19.17; T. ATKINSON, HANDBOOK OF THE LAW OF WILLS, § 80 (2d ed. 1953).

[11]2 BOWES-PARKER, *supra* note 7 at §§ 19.19—19.22. Connecticut, Louisiana, New Jersey, and New York have refused to apply the doctrine, although New York has applied it in certain fact situations.

[12]In re Herzog's Estate, *supra* note 1 at 11. Quoting from *In re Estate of Foxworth*, 240 Cal.App.2d 784, 50 Cal.Rptr. 237, 240 (1966).

[13]In re Smith's Estate, 31 Cal.2d 563, 191 P.2d 413, 416 (1948); Kinnear v. Langley, 209 Ark. 878, 192 S.W.2d 978, 980 (1946).

[14]In re Cameron, 215 Iowa 63, 241 N.W. 456, 461 (1932).

[15]Arrington v. Brown, 235 Ala. 196, 178 So. 218, 220 (1938); In re Dimmitt's Estate, 141 Neb. 413, 3 N.W.2d 752, 759 (1942).

[16]Kinnear v. Langley, *supra* note 13 at 979.

[17]Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51, 55 (1950); Bolles v. Toledo Trust Co., 144 Ohio 195, 58 N.E.2d 381, 389 (1944).

[18]Gionfriddo v. Palatrone, 26 Ohio Opn.2d 158, 196 N.E.2d 162, 166 (1965).

[19]2 BOWES-PARKER, *supra* note 7 at §§ 19.17 *et seq.*; ATKINSON, *supra* note 10 at 80. In re Watt's Estate, 117 Mont. 505, 160 P.2d 492 (1945).

graphic will. This was viewed by the court as merely an attempt to perfect a deed which had failed for want of delivery. The court said:

> The fact that the deed proved ineffectual because not delivered furnished no excuse for incorporating, by judicial construction, such ineffectual non-testamentary document into the will nor for reading into the dead man's writing a devise which he never placed therein.[21]

The court in *Herzog* clearly stated the principle and applied the doctrine to incorporate the ante-nuptial agreement. The treatment appears to be a simple application of the prerequisites, *supra*,[22] which the court found to have been easily satisfied. The writing referred to, the ante-nuptial agreement, was in existence when the will was executed, it was reasonably identified by the will and it was found to have been intended to have been incorporated by the testator.[23]

The particular problem which would appear to arise deals not with the stated requirements necessary for incorporation by reference, but instead the nature of the document incorporated—the ante-nuptial agreement to provide the life insurance policy in favor of the widow Florence. Although it is undisputed that an ante-nuptial agreement may be incorporated to direct disposition of estate property, it must again be noted that it is only the document itself which is incorporated as part of the will. An ante-nuptial agreement has been incorporated herein, but in effect the life insurance proceeds have been incorporated into the estate property as well. By application of the doctrine, the court allows what would normally be enforceable by the widow as a valid, intervivos contractual right, to pass to her as part of her deceased husband's estate. This determination was crucial in the given circumstances, since it was the fact that Florence had received a bequest under the will which called into play the operation of REVISED CODES OF MONTANA § 22-107 (1947) giving the widow the right to elect her statutory share.[24]

A life insurance policy represents a contractual obligation between the insurance company and the insured to pay the proceeds of the policy to the beneficiary upon the death of the insured.[25] When a person insures his own life with the proceeds payable to his own estate, those proceeds are subject to his testamentary disposition.[26] That was not the situation in *Herzog*, however, since Florence was the named beneficiary in the policy taken out pursuant to the ante-nuptial agreement.[27]

Where the insured reserves no right or waives his right to change the named beneficiary, it is the rule "that a policy and the money

[21] *Id.* at 499, 500.
[22] *See* material *supra* note 12.
[23] In re Herzog's Estate, *supra* note 1 at 11.
[24] *Id.* at 12.
[25] 4 CORBIN, CONTRACTS, § 807 (1951).
[26] Hearton v. Kreig, 167 Ind. 101, 77 N.E.2d 805 (1906).
[27] Letter from Bernie Berg, Jr., to Vester R. Rusoff, Esq., October 18, 1973.

to become due under it, belong, the moment the policy is issued, to the person named in it as beneficiary."[28] The beneficiary's right is qualified where the power to change the beneficiary is reserved by the insured. Therein, the beneficiary has a vested right subject to defeasance should the insured change the named beneficiary.[29] The Montana court has said that such a change must take place in accordance with the applicable contract provisions contained in the policy.[30] Even if it is assumed that policy holders generally reserve the right to change the beneficiary, the right may be waived or divested by agreement. Arguably, the ante-nuptial agreement would have had that effect.

In *Western Life Insurance Co. v. Bower*,[31] it was noted that use of the word "irrevocable" is unnecessary and has no real legal effect. Instead, it is the effect of the words used which controls. "An agreement whereby the proceeds of an insurance policy are, in every conceivable event, disposed of, is tantamount to a designation of an irrevocable beneficiary."[32] The importance of the above is that the policy taken out pursuant to the ante-nuptial agreement and subject to the condition subsequent that the parties remained married, seemingly entitled Florence to the proceeds based upon her contractual rights under both the ante-nuptial agreement and the life insurance policy. By even the strictest standards, the right to receive those proceeds vested in her upon the death of her husband.

By the court's application of incorporation by reference, however, the proceeds were said to become a bequest under the will, "and the fact that it is paid out of insurance proceeds which are generally not a part of the estate is immaterial."[33] It would appear that since it was this very bequest which by operation of the statute forced the widow to elect whether to take under the will or renounce, the source of the bequest is indeed material. By application of the doctrine, the court permitted the disposition of property which was not part of the testator's estate.

Perhaps the fact which was formost in the court's consideration, and one which has been left only to implication to this time, is that Rudy and Florence Herzog had been married for but 14 months and were estranged after just 10 months. That Rudy's estate was valued at over $300,000, and that he obviously wished to leave it to his minor children in favor of his estranged wife, must have weighed heavily in the court's judgment. Based upon an initial reaction, the result which the court

[28]U.S. v. Bess, 243 F.2d 675, 677 (3d Cir. 1957); citing as authority *Central National Bank of Washington City v. Hume*, 128 U.S. 195 (1888).

[29]Western Life Ins. Co. v. Bower, 153 F. Supp. 25, 28 (D.Mont. 1957); *aff'd Bower v. Bower*, 255 F.2d 618 (9th Cir. 1958).

[30]Bell v. Crivianski, 98 Mont. 109, 27 P.2d 673, 676 (1934).

[31]Western Life Ins. Co. v. Bower, *supra* note 29 at 29.

[32]*Id.* at 29.

[33]In re Estate of Herzog, *supra* note 1 at 11.

reached cannot be said to be undesirable. After all, the widow did receive substantial proceeds from the policy and the estate was preserved for the needs of the testator's minor children. It is fundamental that courts will construe a will according to the intent of the testator and where his intention cannot have effect to its full extent, it must have effect as far as possible.[34] Herein, however, the court may have gone too far.

THE UNANSWERED QUESTION

By applying the doctrine of incorporation by reference and deciding that a devise had been made to the widow under her husband's will, the court avoided having to render a delicate interpretation of R.C.M. 1947, § 22-107. The statute provides:

> Every devise or bequest to her by her husband's will shall bar a widow's dower in his lands and her share in his personal estate unless otherwise expressed in the will; but she may elect whether she will take under the provisions for her in the will of her deceased husband or will renounce the benefit of such provisions for her, and take her dower in the lands and her share in the personal estate under the succession statutes, as if there had been no will, but not in excess of two-thirds (⅔) of the husband's net estate, real and personal, after the payment of creditor's claims, expenses of administration and any and all taxes, including state and federal inheritance taxes.

What is patently clear, and what the court found to be a deciding issue in this case, is that where a husband dies leaving a will *with a devise or bequest to his widow,* the widow may elect to take under the provisions of the will or renounce in favor of her statutory share so long as she does so within the six months as required by R.C.M. 1947, § 22-108.[35] Where there is no devise or bequest to the widow under the will, however, it is not certain whether the widow may elect her statutory share within the statute, or whether she must resort to challenging the will in some other manner. It was this issue which generally occupied the briefs of counsel in *Herzog,* and, in fact, the doctrine of incorporation by reference was never mentioned in the briefs of either party.[36]

By a literal reading of R.C.M. 1947, § 22-107, and by implication in the decision,[37] it appears that the statute applies only if there is a bequest to the widow under the will. There is some support for this view in *Schwartz v. Smole,*[38] wherein there is dictum which provides that,

[34] R.C.M. 1947, § 91-201. Testator's intention to be carried out.
A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.
Although the court did not mention this principle, it is such a basic premise of construction that the court may have been trying to carry out the intention which they had to look to in order to find that the doctrine of incorporation by reference should be applied.

[35] R.C.M. 1947, § 22-108.

[36] Brief for Appellant and Respondent, In re Estate of Herzog, *supra* note 1.

[37] In re Estate of Herzog, *supra* note 1 at 12.

[38] Schwartz v. Smole, 91 Mont. 90, 5 P.2d 566 (1931).

"the widow is required to renounce under a will and elect to take her dower interest only when the will contains a devise or bequest to her."[39] In that case, however, the widow did renounce and was entitled to her statutory share although the executor had ignored her renuncition.[40] Additional decisions outside Montana contain similar language, however, none speak directly to the Montana problem.[41]

Such a position, however, would seemingly enable a husband to deny the widow her statutory interest simply by not mentioning her in his will. This was probably not what the legislature had in mind in drafting the statute, yet such an interpretation is not an unreasonable one. A widow not mentioned in her husband's will would then be forced to rely upon either a contest or challenge of the validity of the will under R.C.M. 1947, § 91-1101,[42] or the filing of a petition to determine heirship[43] or similar proceeding in order that she might take by succession. The former challenge would be subject to the same six-month statutory limitation as required by R.C.M. 1947, § 22-108. Under the latter procedure, which was followed by Mrs. Herzog in this case, there is not such a time limitation; however, it is questionable whether such a determination would have any effect since decedent left a valid will.

At any rate the above discussion can only be deemed speculative since by application of the doctrine of incorporation by reference the court determined that there had been a bequest to Florence under the will. Although that application is questionable, it did serve to bring the widow within R.C.M. 1947, § 22-107, thus compelling her to renounce the will within the six-month statutory limit. As a result, we are left without a definitive rule as to whether a widow who is not mentioned in her husband's will may make an election to receive her statutory share.

## *CONCLUSION*

Recognition of the doctrine of incorporation by reference in *Herzog* serves to place Montana in accord with the mainstream of United States

[39] *Id.* at 567.

[40] *Id.* at 567, 568.

[41] Able v. Bane, 123 Ind.App. 585, 110 N.E.2d 306, 308 (1953); Sperry v. Swiger, 54 W.Va. 283, 46 S.E. 125, 127 (1903); Hamilton v. Webster's Executor, 284 Ky. 564, 145 S.W.2d 82, 83 (1940).

[42] R.C.M. 1947, § 91-1101. The probate may be contested within six months.
When a will has been admitted to probate, any person interested may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked.

[43] R.C.M. 1947, § 91-3801. Proceedings to determine heirship.
Any person claiming to be heir to the deceased, or entitled to the distribution in whole or in part of an estate may, at any time after the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court or judge to ascertain and declare the rights of all persons to said estate, and all interest therein, and to whom distribution thereof should be made . . . Further in all estates in which the decedent left a will, it shall be unnecessary to determine heirship

jurisdictions. The course taken by the court to reach that position, however, represents what this writer believes to be an unnecessary application of the doctrine. It is unfortunate, too, that the question of whether a widow may renounce her husband's will and elect her statutory share where there has been no bequest to her remains unsolved. By the hasty application of the doctrine by reference, the court avoided having to make that determination. Although application of the doctrine should be generally welcomed, nonetheless, it is hoped that in the future the doctrine will be applied only in those situations where it is indeed relevant.